

27. Feb. 1761.

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MEMORIAL

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John Watson of Muirhouse, Esq; and the other Creditors-Adjudgers of James and William Craigs, Andrew Scott and Richard Stark, all Merchants in Glasgow.

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JAMES CRAIG granted an heretable Bond, in the Year 1730, over certain Tenements belonging to him in the Town of Glasgow, in favours of William, Andrew, Robert, Agnes and Mary Craigs, for the Sum of 21,000 Merks *Scotts*, bearing Annualrent from *Whitsunday* 1730; and upon this Bond Infestment followed.

Andrew Scott, in the 1740, granted an heretable Bond over certain Tenements he had in the same Town, in favours of Robert, Margaret, Janet, Marion and Mary *Scotts*, for the Sum of 3400 Merks, bearing Annualrent from *Lammas* 1740; and upon this Bond the Creditors were infest.

In that Year 1740, Mr *Watson* of *Muirhouse* obtained a Decreet of Adjudication of the Tenements belonging to *James Craig*, of the Tenements belonging to *Andrew Scott*, of certain Tenements likewise lying in *Glasgow*, belonging to *William Craig*; and also, of certain Tenements there, belonging to *Richard Stark*, for Payment of the accumulate Sum of L. 510. 6. 0.

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Sterling,

Sterling, arising from a Bond granted by the said *William* and *James Craigs*, *Andrew Scott*, and *Richard Stark* jointly.

In the same Year 1740, the fundry other Adjudications following were obtained against all or some of these four Persons, viz.

John Murdoch obtained one against them all four, of the Tenements belonging to them respectively, for Payment of an accumulate Sum of L. 839. 7. 0. *Sterling*, arising from a Bill accepted by them all jointly; and of the Subjects belonging to *Stark*, *Scott*, and *William Craig*, for L. 524. 18. 0. more, in which they three were jointly bound; and of *William Craig's* Subjects for L. 155. 2. 0. more, in which he alone was bound.

Marion Alexander obtained Adjudication against *Stark*, *Scott*, and *William Craig*, of their respective Subjects, for L. 75. 9. 3. in which they were jointly bound, and against *Scott* for a further Sum of L. 10. 6. 5. in which he was singly bound.

Gavin Ritchie adjudged the Subjects of *Stark*, *Scott*, and *William Craig*, for L. 104. 7. 11. in which all three were bound; and the Subjects belonging to *Scott*, for a further Sum of L. 296. 1. 5. in which he alone was bound.

Andrew Gairdner obtained Adjudication against the same *Stark*, *Scott*, and *William Craig*, of their respective Subjects, for L. 799. 11. 3. in which they three were jointly bound.

And Mr *Robert Dick* adjudged the Subjects of the same three, for L. 209. 14. 5. in which they were all jointly bound.

And all these Adjudications, as against *Stark* and *William Craig*, contained also certain Shares of the old *Wester* and *King-street* Sugar-houses in *Glasgow*, which had once belonged to them.

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As the foresaid Debts did greatly exceed the Value of the whole Subjects belonging to the four Debtors, a Process was brought in the Year 1746, at the Instance of Mr *Watson* against *James* and *William Craigs*, *Andrew Scott*, and *Richard Stark*, and their Creditors, for ranking the Creditors on, and selling, not only the Tenements in the Town of *Glasgow* which belonged to them respectively, but also the Interests of *Stark* and *William Craig* in the Sugar-houses. This Action having come in course before the Lord *Minto* Ordinary, Comparence was made for the Proprietors of the new united *Wester* and *King-street* Sugar-houses, who alledged, That Part of the Subjects libelled in this Sale and Ranking as belonging to the common Debtors, fell to be excepted, for that *Richard Stark* and *William Craig* having failed in their Circumstances, the Proprietors of the two old Houses were obliged to bring the Subjects of their two Companies to Sale by a voluntary Roup: That this Sale being challenged by Reduction at the Instance of one of the Partners, the Purchasers at the Roup raised a Counter Process for having it declared, That the Sales were valid: And that, after a litigious Debate, the Purchasers prevailed, having been affoilzied from the Reduction, and having obtained Decreet in their Declarator, whereby the Property of these Subjects were fully vested in the Purchasers; and so must bar any after Sale at the Instance of this Pursuer.

Whereupon the Lord Ordinary, of this Date, “ sustain- 15. Jan.
 “ ed the Defence with respect to the Subjects libelled 1747.
 “ as Parts of the old *Wester* and *King-street* Sugar-
 “ houses, and found the same cannot fall under the
 “ present Process, but are to be excepted therefrom;
 “ but sustained Process as to the *whole other Subjects*
 “ libelled.” And pronounced Act upon the Relevancy, in
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the usual Form, which was accordingly extracted on the 4th of *May* 1748.

A Proof was, in consequence thereof, led and reported, and thereafter the Ranking proceeded; which, after a twelve Years Dependence, was lately brought to a Conclusion, and the Decreet of Ranking extracted at a very great Expence. By the Proof in the Sale, the Subjects belonging to each of the four Debtors are separately valued; and it thence appears, That the total Value of the whole Subjects to be sold amounts only to *L.* 1782. 15. 0. whereas the Debts, independent of the Interest that hath become due, amount to *L.* 4612. 4. 6 $\frac{1}{3}$. so that, after deducing the Debts secured by Investments, there will not remain to the adjudging Creditors above 10 *per cent* of the Sums that are due to them at this Day.

That when the Probation in the Sale came in for advising by your Lordships, it being stirred as a Doubt, how far the Estates of four different Debtors could be brought to Sale upon one Summons; you were pleased to ordain a Memorial to be given in upon that Point, "How far it is competent to raise and insist in an Action of Ranking and Sale of the Estates of several Bankrupts in one Process and upon one Libel?" This is humbly offered in behalf of the Creditors.

And, in the 1st Place, they must beg leave to observe, That after the Process has depended in Court for 14 Years, and a great Sum of Money has been expended in the several Proceedings during that Period, it will be at least extremely hard, if, after Things were brought to a Conclusion, all must go for nothing, and the Creditors must begin a-new, and, before they can touch their Money, carry on and conclude four new several Processes of Sale. If your Lordships shall be of Opinion that you are tyed down to this Form of Procedure, the Consequence will be, that the Creditors
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may give up all Thoughts of bringing the Subjects of some of their Debtors to Sale, and must leave them either to go into Ruin, or to be taken up by any Person that pleases. *Richard Stark's* Subject is only valued at *L. 21. 5. 0. Sterling*; which, surely, could never bear the Expence of a judicial Sale. As to the Subjects of *Andrew Scott*, after paying the heretable Bond he granted to his Brother and Sisters, no more remains to the Adjudgers but *L. 86. 1. 6. Sterling*, which is likewise insufficient to defray the Expence of a Process of Sale. *James Craig's* Subject is much more than exhausted by a preferable heretable Bond, whereby nothing will remain of it to the Creditors. And thus, if the whole Subjects cannot be sold upon the Process already brought, the Creditors must give up all Thoughts of bringing any of them to Sale except those of *William Craig*, the Value of which are proved to be *L. 422. Sterling*. But it is humbly hoped, that, upon reconsidering the Case, your Lordships will be of Opinion that there is nothing either in the Law, or in the Reason of the Thing, which can afford an Objection why your Lordships should not proceed to sell all the Subjects upon the Action that has been already brought.

And here the Memorialists must humbly beg leave to doubt if the Question stated in your Lordships Order is now entire: Your Lordships will observe, that this Action was brought as early as the 1746: In *January 1747*, upon an Objection stirred as to some of the Subjects that were contained in the Summons of Sale, Judgment was given, that the Sale could not proceed as to these; "but, at the same Time, your Lordships sustained the Process as to the whole other Subjects libelled, and admitted to Probation the Points usual in such Cases:" And upon this an Act was extracted in the Year 1748. The Interlocutor here is a *res judicata*, and cannot now be brought under Review of this

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Court, according to its standing Regulations; nay, the Creditors beg leave to say, that it is not now reviewable even by the House of Peers: Their standing Order of *March 1725* bars all Appeal against it, now that twice five Years and more are elapsed since an Extract followed on the Sentence given in the 1748: And therefore it is humbly submitted to your Lordships, if now, after the elapsing of 13 Years since Judgment given by which this Action was sustained as to the whole Subjects now in question, and an Act was extracted thereon, and after a Proof led and the Ranking brought to a Conclusion, it is competent to overhawl all these Proceedings; to make it a Question, whether the Action was competent, or ought to have been sustained? and this in order to oblige the Memorialists to bring four separate Proccesses of Sale before they can touch their Debts.

But, *2do*, If the Question was still entire, the Memorialists humbly hope they shall be able to satisfy your Lordships that, under the Circumstances above-stated, there is nothing unformal in carrying on a Sale of the whole Subjects in question upon the same Summons of Sale, though they do not all belong to the same Person.

And, as to this Point, although it may be true that an *accumulatio actionum* in the same Summons is not allowed of, where the Ground of Action against two or more Persons is different, so that these Persons cannot be pursued upon one and the same Summons or Proccess; yet it cannot be disputed, that when the Ground of Action and Conclusions against different Persons is the same, there is no Occasion for a separate Summons against each of them; but as the Ground and Tendency of the Action is the same, they may be all proceeded against in the same Proccess.

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Thus it has always been understood to be a clear Case, that where two or more Persons have granted a joint Obligation, the Creditor in that Obligation can insist for Implement against all the Co-obligants by one and the same Summons: And indeed it would be both improper and inept to divide them; for any one of the Co-obligants called might insist that the whole should be brought into the Field before the Action could proceed. For the same Reason it has been the uniform Practice of your Lordships, where two or more Persons are bound jointly in any Obligation, to issue Warrant for Letters of Horning, Poinding, Inhibition, Arrestments, and the other Diligence of the Law, against the whole Co-obligants: And it was never doubted of, that the whole could be contained in the same Letters, and that upon the same Letters Execution could proceed against all their Persons; that the Effects of the whole Co-obligants could in like Manner be arrested or poinded upon the same Letters.

And as this is the uniform Practice of the Court for personal Actions, and in Diligences, to affect the personal Estates of Debtors; so no Reason does occur why the same Rule ought not to take place in those Actions by which the real Estate of a Debtor is attached. If it is competent to a Creditor, who has two or more Co-obligants bound, to insist against all of them, in the same Summons, for Implement of their Obligation, and, in default of Payment or Performance, to arrest or poind the Effects of all of them upon the same Decreet; there seems, with Submission, to be the same Reason why the real Estates of all the Co-obligants may be adjudged to the Creditor in Payment and Satisfaction of the Obligation they had jointly come under. Where two or more Persons are jointly bound to pay a Sum of Money, there is an implied Obligation upon them, where they are unable to pay
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the Money, to concur in doing Justice to the Creditor, by disposing their Effects, real as well as personal, to the Amount of their Debts: And as an Adjudication is an Act of the Law, or of the Judge, interposing to supply the Act of the Debtor; so, with Submission, it does appear to be competent, and founded in the Reason of the Thing, to adjudge, upon one Summons, the Estates of all those who are bound in the Obligation, in implement of which the Adjudication is craved.

The Memorialists, therefore, apprehend, that, where two or more Persons are jointly bound for any Debt, it is competent for the Creditor to adjudge the Estates of all the Co-obligants by one Decreet; and the Memorialists are informed, by the ablest Practitioners about the House, that the Practice has gone that Way: And, agreeably to this Practice, Mr *Watson* the Leader of the Sale, and the whole other adjudging Creditors above-mentioned, did, each of them, adjudge the Estates of all the Debtors by one Decreet proceeding upon one Summons.

And if Adjudications were effectual for attaching the real Rights of all these Estates, whereby the whole of them became vested in the Person of the Adjudger, subject only to the legal Reversion competent to the Debtor; the Memorialists can see no good Reason why any one of their Number could not, in one Summons, prosecute any Action that might be judged necessary for carrying the Adjudication further into Execution. There surely can be no Dispute, that, where a Creditor has affected the Estates of all his Co-obligants by an Adjudication, it is competent to him, in order to operate Payment of his Debt, to bring an Action of Mails and Duties against the Possessors of all the Subjects adjudged; nor would it be any Objection to the Action, that they were contained
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in one Summons. An Action of Ranking and Sale is only carrying the Execution of the Diligence a Step further, that, in place of having Access to the Rents, the Creditors may have Access to the Value of the Subject. The Adjudger is entitled to levy the Rents and Profits adjudged, until his Debt be compleatly paid: But as Payment cannot be had out of the Rents and Profits of the Subjects where they are incumbered with Debts above the Value, so this extraordinary Remedy was introduced, that it should be competent for the Creditor to bring the Subjects to a Sale, that so the Creditors may recover their Payment out of the Price as far as it would go. And it does not occur to the Memorialists, what Objection can ly, why, when a Creditor has adjudged the Estates of the several Persons liable to him in the Debt, and when, on account of the bankrupt Circumstances of the Estates, he cannot recover his Payment out of the Rents and Profits of the Subject upon a Decreet of Mails and Duties against the Possessors, he should not be allowed, in one Summons, to conclude to have the whole Subjects that he had affected for his Debt sold, that he may recover his Payment out of the Price.

And put the Case, that in place of bringing the Subjects to a Sale, in order that the Price might be divided among the Creditors, the Subjects themselves were to be divided among the Adjudgers; it could not be maintained, that the Creditor, who had affected by an Adjudication the Estates of two or more different Persons who were jointly liable to him for the Debt, behoved to bring as many separate Processes of Division: The Memorialists apprehend, that as these different Estates had been adjudged to the Creditor, whereby they were vested in him, and he became Proprietor of all these Subjects, *pro indiviso*, along with the other Creditors who had adjudged; it

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would be competent for him, in one Summons, to pursue a Division of all the Subjects vested in him by his Adjudication, against every Person pretending to a joint Interest therein; in the same Manner as he would be entitled to pursue a Division of any other Estate belonging to him, in which others had a joint Property, without distinguishing whether the Pursuer had derived his Right to these Subjects from one or more Authors: And if it would have been competent to pursue a Division of these different Subjects in one Action, the Memorialists cannot discover a good Reason why it is not competent, upon one Summons, to insist in an Action, the sole Tendency of which is to procure a Division of the Price.

And, indeed, the Reason is the same in the Process of Sale as in the preceding Process of Adjudication; for as there was one Ground of Debt in the Process of Adjudication, so there is one Ground of Action in the Process of Sale, *viz.* the Pursuers Decreet of Adjudication against all these Estates: And if your Lordships should find it necessary, in such Cases, to pursue distinct Processes of Sale of the different Debtors Lands, not only would it be attended with prodigious Expence to Creditors, but as the Decreet of Adjudication, which is the Foundation of the Sale, cannot be produced in different Processes at the same Time, this would render it impracticable to carry on more than one of those Sales at once, unless the Leader of the Sale provides himself with as many Extracts of the Decreet as there were Subjects adjudged belonging to different Debtors: And not only must the Leader of the Sales be provided with so many different Extracts, but likewise the other Creditors who had adjudged these different Estates behoved to be provided with as many different Extracts of their DECREETS of Adjudication as there were different Processes of Sale, that they

they might be enabled to produce their Diligences in the different Processes of Ranking that accompanied the Sales.

This Question was determined by your Lordships in the 1747, in the Process of Sale of the Estates of *Furnart* and *Tullichintaul* : The Case there was, That Mr *Thomas Arbuthnot* being Creditor to *M^r Farlane* of *Furnart*, and *M^r Farlane* of *Tullichintaul*, in a Sum for which they had granted their joint Bill, he led an Adjudication of both their Estates in payment of that Debt : Thereafter, upon the Bankruptcy of both the Debtors, he brought a Process for Sale of both their Estates in one Summons, concluding for a previous Ranking : And when that was concluded, the same Doubt that is stirred here did then occur in the Sale ; but your Lordships allowed the Sale to proceed, only ordering, that the Estates should be sold separately, which was a necessary Step, in regard that some Creditors were ranked upon the one Estate, that were not upon the other.

This is a Decision in point ; and it is humbly hoped your Lordships will follow the same Course here. The Memorialists have endeavoured to shew, that no legal Objection lyes against the Action ; and surely no Objection lyes against it in point of Expediency, but, on the contrary, great Expence, as well as other Inconveniences, will be avoided. The Bulk of the Creditors have three of the common Debtors bound jointly for their Debts, some of them have all the four Debtors bound. The Interest of the several Creditors, in these different Estates, is distinctly ascertained in the Decreet of Ranking, and the Value of each Debtor's Subjects is separately ascertained by the Proof, and distinctly stated in the prepared State and Scheme of it ; so that every Thing is clear for the appointing of the
Estates

Estates to be roused separately; and, when that is done, full Justice will be done to all Parties concerned.

Upon the whole; as this Practice in the Case of Sales is reasonable in itself, and agreeable not only to the Nature and Forms of other Actions, but has been sustained by the Judgment of the Court, it is humbly hoped your Lordships will see no Reason for introducing an Alteration, which would be attended with many Inconveniences and Disadvantages to Creditors, and, in this particular Case, would have the Effect to put it out of the Power of the Creditors to bring some of the Subjects in dispute to a Sale at all; but that you will proceed to advise the prepared State, and pronounce an Act of Roup in the usual Form.



RO. M'QUEEN.